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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON JOHNATHAN DAVIS, Defendant and Appellant.	H041255 (Santa Clara County Super. Ct. No. C1369909)

Defendant Aaron Johnathan Davis appeals from a judgment of conviction entered after a jury found him guilty of stalking Marcy Morigeau while a restraining order was in effect between July 17, 2013 and March 3, 2014 (Pen. Code, § 646.9, subd. (b) - count one), violations of a restraining order protecting Morigeau on September 29, 2013 and December 13, 2013 (Pen. Code, § 273.6, subd. (a) - counts two and four), and violation of a restraining order protecting Timothy Morigeau on December 13, 2013 (Pen. Code, § 273.6, subd. (a) – count three). The trial court sentenced defendant to the upper term of four years on count one, a consecutive term of one year in county jail on count three, and concurrent one-year county jail sentences on counts two and four.

On appeal, defendant challenges the sufficiency of the evidence to support all four counts and the admissibility of certain evidence. We conclude that there was insufficient evidence to support the felony conviction of stalking while a protective order was in effect and the misdemeanor convictions of violation of a restraining order, because the

restraining orders were void due to lack of proper service. We reject his remaining contentions. Accordingly, the judgment is reversed. On remand, the trial court is directed to reduce the conviction in count one to the offense of stalking (Pen. Code, § 646.9, subd. (a)), strike the convictions in counts two, three, and four (Pen. Code, § 273.6), and resentence defendant.[1]

I. Statement of Facts

In 1996, Morigeau began dating defendant when she was almost 16 years old and he was 19 years old. At that time defendant told her that he had been arrested for shooting someone in Santa Cruz and explained that he had acted in self-defense. They were in a relationship for about 13 and a half years. Their son, Jonathan, was born when Morigeau was 19 years old.

Morigeau described her relationship with defendant as "dysfunctional." Defendant was manipulative and had strong opinions about how she spent money and with whom she associated. He was verbally abusive and accused her of doing things behind his back, poisoning him, lying to him, and sleeping with coworkers or doctors. He called her a whore, a bitch, and a liar. By the end of their relationship, Morigeau endured daily verbal abuse.

Morigeau also described incidents involving physical abuse by defendant. In the spring or summer of 2000 when Morigeau was pregnant, defendant grabbed her hair to pull her into the car. After they began living together in 2005, defendant hit her in the face with a clenched fist and caused a black eye. Sometime between 2005 and 2007, defendant became upset with Morigeau, told her to "shut the fuck up," put one of his hands around her neck, and squeezed. She had unspecified injuries. During an argument

[1] Defendant has also filed two petitions for writ of habeas corpus, which we will dispose of in a separate order.

sometime between 2006 and 2008, defendant grabbed Morigeau's shoulders and threw her on the bed, which caused bruising on her shoulders. Morigeau did not report these incidents to the police, because she was worried that it would make him even angrier with her. She also hoped that he would change.

The "last straw" for Morigeau was an incident in 2010 when defendant brought Jonathan to the hospital where she worked at 11:00 p.m. to determine whether she was actually working. Morigeau decided to move out of their house and she and Jonathan moved into an apartment. Though Morigeau considered that her relationship with defendant was over, she tried to stay friends with him.

Sometime between May and July 2011, defendant came to Morigeau's apartment and told her that after he had been attacked at a park near his house, he went home, retrieved a hammer, and hit one of the attackers in the head with the hammer. Morigeau told defendant to leave. Defendant left, but returned, entered her house, pushed her onto the floor, started choking her with both hands, and stated that he was going to kill her. She yelled for her friend, who was in another room. When her friend arrived, defendant ran out the door. Morigeau called the police and told them that defendant had pushed his way into the apartment and thrown her onto the floor, but she did not tell them about the threat. Defendant was eventually arrested for the assault with a hammer and was in custody for about a year.

While defendant was in custody, Morigeau and Jonathan moved into a house, which she had purchased in November 2011. She did not tell defendant where they were living. Her brother, Timothy Morigeau, moved into the house at the same time. Due to

defendant's actions, including carrying a knife, Morigeau had an alarm system and surveillance cameras installed at her home.[2]

After defendant was released from custody, his sister called Morigeau and asked on his behalf whether there was any way that they could talk. After a few phone calls, she made it clear to defendant that she would only communicate with him about Jonathan. When he e-mailed her about their relationship, she again told him that she would only answer his questions about Jonathan. However, after he continued to e-mail her, she blocked his e-mail addresses. Defendant then created different e-mail addresses. Morigeau changed her e-mail address.

Though Morigeau also changed her telephone number, she called one of defendant's siblings who gave him her new number. Morigeau told defendant that she did not want to talk to him, but he continued to call her. Defendant left voice mails in which he called her "a pussy," "a coward," and "a fucking evil bitch" because she would not talk to him. Morigeau again changed her telephone number and did not give it to anyone.

In April 2013, defendant arrived at Morigeau's home and told her that he wanted Jonathan's birth certificate. She told him that he could get it from the courthouse. She also told him to leave or she would call the police. Defendant left, but he returned within 10 to 15 minutes. Morigeau told her brother to call the police. Defendant said, "I'll be back in two days. You better have that birth certificate or else." Morigeau considered his statement a threat. Jonathan was also home at the time and heard defendant's statements. According to Morigeau, Jonathan was worried that if she did not do or say what defendant wanted, defendant would hurt her. Jonathan tried to convince her to give

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[2] According to Morigeau, Luis Ibarra, her uncle, told her that defendant pulled out a buck knife and put it in Ibarra's face during a family gathering. Morigeau had also seen the knives that defendant carried with him.

defendant the birth certificate. Jonathan would not sleep in his room and wanted to stay at a hotel because he did not feel safe in their home.[3] Morigeau felt "violated," so she decided to apply for a restraining order. She had not previously applied for a restraining order, because she was hoping that defendant would move on with his life.

On April 16, 2013, Morigeau applied for a restraining order for herself, Timothy Morigeau, and Jonathan. She was granted a temporary restraining order and told to serve it on defendant in order to get a hearing on her request for a permanent restraining order. The temporary restraining order prohibited defendant from coming within 300 yards of their home, work, and school. It also prohibited him from having any contact with them by phone, mail, or e-mail.

After the temporary restraining order was granted, Morigeau tried unsuccessfully to determine where defendant lived in order to serve him. She asked for a continuance because she was unable to obtain this information from his family. After the hearing was continued to June 2013, Morigeau hired process servers. Based on what she learned from them, Morigeau believed that defendant was attempting to evade service. After the hearing was continued to July 3, 2013, Morigeau paid the process servers to continue trying to serve defendant. When the hearing was continued to August 1, 2013, the court told Morigeau that there was a limit to the number of continuances that were allowed.

On July 17, 2013, defendant left a note in Morigeau's mailbox and asked her to sign the title to a car over to him. The note stated that he was going to return around 10:00 p.m. or 11:00 p.m. and at 6:15 a.m. and 7:15 a.m. The note also stated, "I will stay in the neighborhood for the night," and "I know you don't want me here, but trust me, after all I've heard, I don't want to be here either." There was also a Department of Motor Vehicles (DMV) form with the note. Morigeau signed the DMV form, placed it

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[3] The trial court instructed the jury that the hearsay statements were admitted only as to Morigeau's state of mind.

behind the restraining order paperwork in an envelope with defendant's name on it, and put the envelope in her mailbox. Defendant returned between 10:30 p.m. and 11:30 p.m. and set off the alarm on the surveillance camera. Morigeau looked through her kitchen window and saw defendant take the envelope from the mailbox and walk away.[4] Morigeau went to Jonathan's bedroom window and saw defendant leaning against her car. He looked through the papers in the envelope for between three and five minutes. After defendant read through the contents of the envelope, he removed the DMV form, put the remaining documents in the envelope, threw the envelope in front of her door, and walked away.[5]

Defendant returned later that night and left a note.[6] The note read, "If I ever find out you have a restraining order going through on me I will violate it 99 times." The note continued: "I do not respect the courts and anything they order me to do I will do the opposite." "Stop bringing the law and courts in my life, Marcy, before someone end up getting hurt. I am not talking about you or Jonathan. I am talking about me and the cops you use in your games." It also stated: "I do leave you alone and plan to unless you bring the courts and law in my life. Then the war will begin." Morigeau felt very anxious and worried about her and Jonathan's safety.

At about 7:30 a.m. the following day, Morigeau was nervous about going outside. She asked her brother to look out the window and watch her walk to her car. As Morigeau stood next to her car, she saw defendant, who appeared upset, walking towards

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[4] A still photograph shows defendant walking toward the door at 10:55:30 on July 17, 2013, and a video shows defendant taking the envelope.

[5] A still photograph shows the walkway at 10:58:40 on July 17, 2013, and a video shows defendant walking away from the house.

[6] A still photograph at 23:47:21 on July 17, 2013, and a video shows the walkway and defendant shortly before Morigeau believes that he left the second note.

her. She entered her car and as she started to leave, he hit her driver's side window two or three times with his fist. She drove to a nearby 7-Eleven and called 911. She was crying and shaking. Morigeau told the dispatcher that the restraining order had not been served, but she later filled out the proof of service and filed it with the court.

A permanent restraining order was filed on August 1, 2013. It protected Morigeau, her brother, and Jonathan. The order prohibited defendant from contacting them by phone, mail, or e-mail and from coming within 300 yards of their home, work, and school. Morigeau was told by the court to send the order to his last known address and to try to serve him again. She hired a process server to serve the document by mail at his mother's address where he was living when he was released from jail and at the home of defendant's friend. The proof of service was filed on August 12, 2013. On September 13, 2013, defendant filed a motion in which he used his mother's address as his address. He requested that the restraining order be set aside on the ground that he had never been notified or served by an unbiased party.

On August 16, 2013, Morigeau was out of the country, but Jonathan, her brother, and her stepfather, David Altamirano, were at her house. At about 2:40 a.m., her stepfather was talking to her brother in the backyard when they heard the alarm from the surveillance camera and saw defendant at the front door. Her stepfather went outside and called to defendant, who was half a block away. Defendant walked over to her stepfather, who told him that he needed to leave Morigeau alone. Defendant responded, "I just want to talk to her for five to 10 minutes." After her stepfather handed him the restraining order, defendant threw it on the ground and said, "I know what it is." Defendant continued to state that he wanted to talk to Morigeau. Her stepfather told him twice, "You got to cut her loose." He also told defendant that he was concerned about him. The conversation ended when defendant said, "I guess you are going to call the cops." After her stepfather said that he was, defendant "turned sideways and put his right [arm] around back to simulate a fighting stance." Defendant said that "he was ready for

the police," would "take two or three of them down before they g[o]t" him, and walked away. Morigeau was later told about the incident. Morigeau's stepfather also filled out the proof of personal service for the restraining order and filed it with the court.

Officer Trent Tessler went to Morigeau's home on August 16, 2013, after receiving a report of a domestic violence restraining order violation. He contacted Timothy Morigeau and David Altamirano, who showed him surveillance footage of defendant. The officer was told that defendant was unstable and was not afraid of taking on the police. As the officer was leaving the residence, he saw a note to Morigeau from defendant on her vehicle. It read: "Marcy, I'm for real. What do you want to do? Restraining order violation number four. Did you read your e-mails marcy99@att.net? Read them please and understand where I'm coming from and understand if this is what you really want. [¶] I consider my life a waste over and over, so if you want me to play the part then I will. I will stalk you if this is what you want and let me know if you want you want to do and I'll do it."

On August 19, 2013, David Altamirano was staying at Morigeau's house when he found a note on the windshield of her car. He did not read the note, but he asked Timothy Morigeau to notify the police. After Morigeau was later told about both incidents, she was upset and appeared to be stressed.

On August 28, 2013, Morigeau received an e-mail from defendant. The subject line of the e-mail stated: "Please respond. Let me know you had gotten my ten plus messages this being the last one." He wrote: "Here's my number if you change your mind, but fair warning, I am at the time of crossing the point of no return." "I have waited for you to do the right thing for long enough. When the question was asked, what gave me the balls to do it, it was a constant reminder that these people were responsible for me losing my true family." "I will die for you because that's what I feel you want. You make me feel responsible for something so bad that might happen to you or Jonathan, so that being the case, I will die for you." Defendant also wrote: "That being

said, I am taking a couple pieces of shit with me. I will not back down, fuck them and fuck the pigs." Defendant signed the e-mail, "Your insane psycho stalker, baby daddy, lost soul, broken hearted friend to the end." After reading the e-mail, Morigeau felt fearful for her own safety because it was very difficult to deal with someone who was mentally unstable. She reported the e-mail to the police and changed her e-mail address.

Defendant also sent Morigeau messages via Facebook. She first began receiving these messages in August or September 2013 and began blocking them. However, she read the first two messages. One message from defendant asked her to call him and provided his cell phone number. A message from August 16 said that she could "address the problems and have peace if [she] just talk[ed] to him or [she] can play war games." Morigeau did not check Facebook regularly and she was surprised when she discovered how much material defendant had sent her. She did not read the rest of the messages, because the material made it difficult for her to function mentally.[7] Reading the messages made Morigeau feel frustrated, violated, and angry.

On the morning of September 9, 2013, Morigeau found some notes from defendant on her car. The first note read: "Marcy, I'm here. Do not want to string you along. Sleeping in the car. Call me if you want. If you want me out of your life, I give you my word, just give me 30 minutes to talk and I will never bother you again." The second note read: "I'm tired of waiting all night to try to catch you." This note also stated: "I will front you and your brother off." Morigeau interpreted the notes as threatening.

After Morigeau took Jonathan to school, she drove to work. When she stopped at a stoplight, she saw that defendant was behind her. He exited his car and walked to her

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[7] Mark Stevenson, an investigator with the district attorney's office, reviewed defendant's Facebook accounts. One post, dated August 15, 2013, stated: "Restraining orders. What a joke. I take them as a personal challenge."

driver's side window and said, "Why can't you talk to me? I just want five minutes of your time." She responded, "I don't want to talk to you. There is nothing else to talk about. I just want you to leave me alone." Defendant said, "Don't you at least owe me five minutes of your time?" After she said, "I don't owe you shit," defendant punched the car window two or three times and called her a "fucking bitch."

At about 9:30 p.m. on September 17, 2013, Ibarra returned home to find defendant waiting in a nearby car. Defendant approached him and said he wanted to give him an envelope to give to Morigeau because he did not want her to commit perjury. Ibarra told defendant that he would give the envelope to Morigeau. Ibarra told his wife about the incident and gave her the envelope. She called Morigeau the next day. Morigeau told her aunt that she did not want to read the papers. According to her aunt, defendant threatened the police in a letter and she found the letter disturbing. Morigeau asked her aunt and uncle to make a police report, to make a copy of the documents, and to give the original documents to the police. Both Ibarra and Morigeau reported the incident to the police. Morigeau told the police that defendant had previously had weapons, but she was not sure if he currently had weapons in his possession.

In October 2013, Timothy Morigeau was sitting in his car and talking on the phone when defendant approached, held up a piece of paper, and said that the restraining order was no longer valid. Timothy Morigeau initially tried to ignore defendant. When Timothy Morigeau asked for a copy, defendant told him to get his own copy. Defendant then handed him a letter for Morigeau and walked away. The incident was reported to the police.

On December 12, 2013, Linda Altamirano, Morigeau's mother, was staying at Morigeau's house and caring for Jonathan. She was watching television with Jonathan when defendant knocked on the door. She told defendant that he was not welcome at the house and he responded, "I have paperwork that null and voids the restraining order." She replied, "You're still not welcome here" and told him to leave. After defendant

repeated that he had some paperwork for Morigeau, she closed the door. Linda Altamirano then sat and talked with Jonathan to make sure that he was okay. After about an hour had passed, she realized that she had not called the police. Since she thought that she could only call the police if defendant was still there, she did not report the incident. However, one of the surveillance cameras captured this interaction and Morigeau gave the video to the district attorney's office.

On December 13, 2013, Timothy Morigeau was standing in the driveway of his house when defendant approached and gave him an envelope with papers inside.

On March 3, 2014, Morigeau stopped at a supermarket and encountered defendant. The supermarket was within 300 yards of Morigeau's home. She said, "You are not supposed to be here." He responded, "I'm sorry, I didn't know you were going to be here." She said, "I need for you to leave." After he asked her if someone was hurting her, she responded, "It's really no concern of yours and you need to leave now." When he repeated the question, she said, "Good-bye." As defendant walked past her to leave, he was not carrying any groceries.

II. Discussion

A. Validity of Restraining Orders

Defendant contends that the restraining orders against him were void, because the trial court did not have personal jurisdiction over him due to improper service. Thus, he contends that there was insufficient evidence to support his convictions of felony stalking while a protective order was in effect (Pen. Code, § 646.9, subd. (b)) and violations of a protective order (Pen. Code, § 273.6).

"Where, as here, a defendant challenges the sufficiency of the evidence on appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt. [Citations.]" (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.)

The Attorney General contends that the prosecution did not have the burden of proving the validity of the restraining orders and that defendant's actual notice of the orders was sufficient to support the convictions. We disagree.

Penal Code section 646.9, subdivision (a) defines the offense of stalking: "(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ." When, as in the present case, a defendant has been convicted under subdivision (b) of the statute, the prosecution must also prove that there was "a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party . . . ." (Pen. Code, § 646.9, subds. (a) & (b).) Thus, a conviction under Penal Code section 646.9, subdivision (b) requires that the prosecution prove that the prior order was in effect. The term "in effect" is defined as "in operation; in force." (Webster's New College Dict. (4th ed. 2008) pp. 453-454.)

Defendant was also charged with three misdemeanor violations of Penal Code section 273.6. Here, the jury was instructed in relevant part: "To prove the defendant is guilty of this crime, the People must prove: [¶] One, a court issued a written order that the defendant not engage in certain conduct. Please see the restraining orders for the restrictions. [¶] Two, the court order was a protective order issued under California law . . . ." (See CALCRIM No. 2701.) We interpret the second element as establishing that the prosecution must prove that the restraining orders met the requirements of California law.

We next consider whether the restraining orders against defendant were void despite defendant's actual notice.

The Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.) permits the trial court to issue a restraining order to prevent the recurrence of domestic violence. (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1494 (*Nadkarni*); Fam. Code, § 6300.) Under the DVPA, Morigeau, as defendant's former cohabitant and the mother of his son, was entitled to seek a restraining order on behalf of herself, Timothy Morigeau, and Jonathan. (Fam. Code, §§ 6211, subds. (b) & (d), 6301.)

Family Code section 240 et seq. sets forth the procedures for obtaining an ex parte temporary restraining order. (*Nadkarni*, *supra*, 173 Cal.App.4th at p. 1494.) Family Code former section 243 provided in relevant part: "(b) If a petition under this part has been filed, the respondent shall be personally served with a copy of the petition, the temporary order, if any, and the notice of hearing on the petition. Service shall be made at least five days before the hearing. [¶] (c) If the petitioner fails to comply with . . . subdivision (b), the court shall dissolve the order." (Fam. Code, former § 243, subds. (b) & (c).)

Code of Civil Procedure section 414.10 governs service of process under the DVPA. (*Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863-864 (*Caldwell*).) This statute provides: "A summons may be served by any person who is at least 18 years of age and not a party to the action."[8] (Code Civ. Proc., § 414.10.) *Caldwell* held that a restraining order was void, because the order was served on the defendant by the

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[8] The DVPA does not require personal service under certain circumstances. At the petitioner's request, a law enforcement officer, who is present at the scene of reported domestic violence, may serve a temporary restraining order on the respondent, who has not been previously served, and this service constitutes sufficient notice for purposes of Penal Code section 273.6 (Fam. Code, former § 6383, subds. (a) & (e).) In addition, personal service is not required for enforcement of an order when a respondent has actual notice of the order because he or she has personally appeared in court and heard the terms of the order. (Fam. Code, § 6384.) Here, defendant was neither served with the temporary restraining order by a law enforcement officer nor present in court to hear its terms.

plaintiff's sister, who was one of the parties protected by the order. (*Caldwell*, at pp. 863-865.) *Caldwell* explained that the "long-standing prohibition on personal service by the opposing party arises from the adversarial interest present in legal actions and the concern for discouraging fraudulent service." (*Id.* at p. 864.) *Caldwell* concluded: "[T]he prohibition on service by the opposing party is strictly enforced. [Citation.] When a party has served notice on the opposing party, the court lacks personal jurisdiction over the defendant. [Citation.] Personal service by a party renders any judgment or order arising from the proceeding void, despite the defendant's actual notice. [Citation.]" (*Id.* at p. 865; see also *Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043, 1048 ["California is a jurisdiction where the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void."]

Here, the prosecution failed to prove that there was a restraining order in effect when defendant stalked Morigeau between July 17, 2013 and March 3, 2014. Since Morigeau, a party to the action, served defendant with the temporary restraining order, the court lacked jurisdiction over defendant and thus both the temporary and permanent restraining orders were void. The subsequent service by David Altamirano on August 16, 2013, and by a deputy on November 18, 2013, did not alter this result since the order was void when the trial court issued it. For the same reason, the prosecution failed to prove that defendant violated the permanent restraining order protecting Morigeau on September 29, 2013 and December 13, 2013, as well as Timothy Morigeau on December 13, 2013.

The Attorney General's reliance on *People v. Saffell* (1946) 74 Cal.App.2d Supp. 967 (*Saffell*) and *People v. Greenfield* (1982) 134 Cal.App.3d Supp. 1 (*Greenfield*) is misplaced. Neither case involved the issue before us. In *Saffell*, the defendants argued that they could not be found guilty of contempt of court, because they were not parties to the action in which the restraining order was issued and had never been served with the

order enjoining them from blocking the plaintiff's places of business. (*Saffell*, at pp. Supp. 977-978.) *Saffell* held that the defendants could be found guilty of contempt when the restraining order "was directed not only to the defendants in the action, among whom was included at least one unincorporated association apparently a labor union, but also to 'their agents, employees, representatives, organizers, attorneys and servants, and the officers and members of defendant associations and persons acting in concert with them, or any of them.'" (*Saffell*, at p. Supp. 979.) As *Saffell* explained, "'. . . the whole effect of this is simply to make the injunction effectual against all through whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party,* who are in fact *his* aiders and abetters. As we have said, this practice is thoroughly settled and approved by the courts, and there is a fair foundation for a conclusion that persons so co-operating with the enjoined party are guilty of a disobedience of the injunction.'" (*Ibid.*, quoting *Berger v. Superior Court* (1917) 175 Cal. 719, 721.) *Saffell* did not consider whether the named defendants to whom the restraining order was directed could be found guilty of contempt if they were not properly served with the restraining order. In *Greenfield,* the defendant challenged the sufficiency of the evidence to establish that he had knowledge of the restraining order. (*Greenfield, supra*, 134 Cal.App.3d at p. Supp. 5.) However, in rejecting this claim, *Greenfield* did not set forth the evidence supporting the conviction. Thus, *Greenfield* cannot be read as supporting the Attorney General's position, since the defendant in that case may have been in court when the order was made or was properly served with the restraining order.

The Attorney General also relies on *People v. Hadley* (1924) 66 Cal.App. 370. However, *Hadley* supports our conclusion that the orders were void. In *Hadley*, the superior court sustained the defendant's demurrer to an information charging him with violating an order of the Railroad Commission. (*Id.* at pp. 371-372.) Since the Railroad Commission's order directed that a certified copy of the order be served upon the

defendant, *Hadley* held that "an allegation of service upon the defendant of a certified copy of the order of the commission prior to the date of the alleged disobedience of such order is absolutely essential to the maintenance of the [contempt] action against him. It is part of the foundation of the statement of the offense, and without proof of such service the court is without jurisdiction." (*Id.* at pp. 379-380.) Similarly, here, the temporary restraining order stated that prior to the hearing "someone age 18 or older—**not you or anyone else to be protected**—must personally give (serve) a court's file-stamped copy of this form (DV-109, *Notice of Court Hearing*)" to defendant with a copy of various forms.

The Attorney General next acknowledges that the California Supreme Court has held that an individual who believes that he or she has been subjected to an invalid order has two means by which the order may be challenged. "As we said in [*In re*] *Berry* [(1968)] 68 Cal.2d 137 [(*Berry*)], unlike in jurisdictions that do not permit collateral challenges to injunctive orders, '[i]n this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions *when he is sought to be punished for such disobedience*. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong.'" (*People v. Gonzalez* (1996) 12 Cal.4th 804, 818-819 (*Gonzalez*).) However, the Attorney General "submits that the reasoning in *Berry*, *supra*, and *Gonzalez*, *supra*, supports the argument that the alleged failure to effect proper service was not a defense to criminal

charges under section 273.6," because those cases involved orders issued in violation of the defendant's fundamental rights.

First, it is undisputed that service of the court order in the present case was improper. Second, neither case considered the issue of whether a defendant could be convicted of violating an order void due to improper service. *Berry* involved an order that was unconstitutional and thus void (*Berry*, *supra*, 68 Cal.2d at p. 157), while *Gonzalez* involved an order that may have been unconstitutional and thus the matter was remanded for further proceedings (*Gonzalez*, *supra*, 12 Cal.4th at p. 825). Thus, we cannot conclude that the order in the present case cannot be challenged in the manner set forth in *Berry* and *Gonzalez*.

The Attorney General also asserts that *Gonzalez* suggests that defendant's claim should have been litigated in the issuing court. *Gonzalez* rejected the Attorney General's argument that the criminal court did not have the facts giving rise to the order and thus the issuing court was the more appropriate forum to contest it. (*Gonzalez*, *supra*, 12 Cal.4th at p. 824.) *Gonzalez* stated: "This claim is of little weight, because defendant primarily sought to attack the injunction on its face, a claim that requires, and indeed permits, no factual determination." (*Ibid.*) Here, it was undisputed that the restraining order had been served by a party to the action. As in *Gonzalez*, there was no factual determination to be made.

In sum, we conclude that there was insufficient evidence to support the convictions for stalking while a restraining order was in effect and for violating a restraining order.[9]

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[9] The Attorney General argues that defendant "had no right to continue to perpetrate the acts of domestic violence that led to the issuance of the restraining orders." We agree that defendant could be prosecuted for acts of domestic violence committed within the relevant statutory period. However, he could not be prosecuted for violating a void order.

B. Admissibility of Evidence of Uncharged Acts

1. Background

Prior to trial, the prosecutor sought to admit evidence of uncharged acts under Evidence Code sections 1101 and 1109[10] and defense counsel sought to exclude some of this evidence. Both parties also referred to section 352. The evidence included: a two-handed choking of Morigeau in 2011, pushing and shoving Morigeau, choking Morigeau several times, striking Morigeau's face, which resulted in two black eyes in 2007, brandishing a knife against Ibarra, possession of a firearm, possession of other weapons, and shooting another person.

After considering whether the evidence was unduly prejudicial, the trial court determined that the evidence was admissible under section 1101, subdivision (b) to show defendant's intent. The trial court also determined that the evidence was admissible to prove whether the victim was in reasonable fear. The trial court next considered whether the uncharged acts of domestic violence were admissible as propensity evidence under section 1109. Relying on *People v. Ogle* (2010) 185 Cal.App.4th 1138 (*Ogle*), the trial court concluded that the evidence was admissible.

2. Evidence of Uncharged Acts of Violence

Defendant contends that the trial court abused its discretion in admitting evidence that he shot someone in 1996 and brandished a knife against Ibarra at some time before 2010.

"'Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not

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[10] All further statutory references are to the Evidence Code unless otherwise indicated.

prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667 (*Fuiava*).)

"'When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." [Citation.]'" (*Fuiava, supra*, 53 Cal.4th at p. 667.) Moreover, the probative value of the uncharged offense must be weighed against the danger "of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

"'"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." [Citation.]' [Citation.]" (*Fuiava, supra,* 53 Cal.4th at pp. 667-668.)

People v. Garrett (1994) 30 Cal.App.4th 962 (*Garrett*) is similar to the present case. In *Garrett,* the defendant was charged with making criminal threats (Pen. Code, § 422). (*Garrett,* at p. 964.) The defendant brought a motion to exclude evidence of his prior conviction for manslaughter and his prior acts of domestic violence on the grounds of relevancy and undue prejudice. (*Id.* at p. 966.) *Garrett* noted that the prosecution was required to prove that the "defendant had the specific intent that his statement would be taken as a threat" and that "the victim was in a state of 'sustained fear.'" (*Ibid.*) In addition, the prosecution was required to show that "the nature of the threat, both on 'its face and under the circumstances in which it is made,' was such as to convey to the victim an immediate prospect of execution of the threat and to render the victim's fear reasonable." (*Id.* at pp. 966-967.) *Garrett* concluded that the evidence was "extremely relevant and probative in terms of establishing these elements—i.e., that appellant had the

specific intent that his statement that he would 'put a bullet in [Wife's] head,' would be taken as a threat; that upon hearing the statement, Wife was in a state of sustained fear; and that the nature of the statement was such as to convey an immediate prospect of execution of the threat and to render Wife's fear reasonable." (*Id.* at p. 967.) *Garrett* also rejected the argument that the probative value of the evidence was outweighed by its prejudicial effect, since "[s]eldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense." (*Ibid.*)

Here, the prosecutor was required to prove, among other things, that defendant was a person "who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family . . . ." (Pen. Code, § 646.9, subd. (a).) As in *Garrett*, evidence that defendant had shot another person and brandished a knife against Morigeau's uncle was highly probative to show defendant's intent to cause fear and the reasonableness of Morigeau's fear.

Defendant argues, however, that the evidence of the shooting and knife incidents was more inflammatory than the charged offense of stalking, and thus unduly prejudicial. We first note that, unlike in *Garrett*, the evidence of the shooting was not identified as a homicide. Moreover, the "undue prejudice" referred to in section 352 "is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Though prejudicial, the evidence in the present case would not have generated an emotional bias against defendant in light of the other evidence presented at trial. Thus, the trial court did not abuse its discretion in admitting this evidence.

3. Evidence of Uncharged Acts of Domestic Violence

Defendant contends that the trial court abused its discretion in admitting evidence of uncharged acts of domestic violence under section 1109.

Section 1109, subdivision (a)(1) states that ". . . in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." Evidence of a person's past conduct is not permitted to prove his or her disposition to commit the charged offense. (§ 1101.) Though section 1109 does not refer to disposition, when this instruction is read together with section 1101, it authorizes the admission of evidence of the defendant's commission of other acts of domestic violence to prove his or her conduct on a specific occasion, that is, his or her disposition to commit the charged offense.

Defendant contends that section 1109 does not apply in the present case, because stalking is not an offense involving domestic violence.

Section 1109, subdivision (d)(3) states: "'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense."

Penal Code former section 13700 defines "'[d]omestic violence'" as abuse committed against former cohabitants and others and defines "'[a]buse'" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another." (Pen. Code, former § 13700, subds. (a) & (b).)

Family Code section 6211 defines "[d]omestic violence" as "abuse perpetrated against," among others, a former cohabitant. (Fam. Code, § 6211.) "[A]buse," for purposes of this provision includes "intentionally or recklessly to cause or attempt to cause bodily injury," placing "a person in reasonable apprehension of imminent serious bodily injury to that person or to another," and engaging "in any behavior that has been or could be enjoined pursuant to [Family Code] Section 6320." (Fam. Code, former

§ 6203.) Behavior that may be enjoined under Family Code section 6320 includes "stalking," as well as attacking, striking, threatening, battering, harassing, telephoning, and disturbing the peace of the other party. (Fam. Code, § 6320, subd. (a).)

However, defendant contends that the trial court was bound by *People v. Zavala* (2005) 130 Cal.App.4th 758 (*Zavala*). In *Zavala*, the defendant was charged with stalking in violation of Penal Code section 646.9 and the trial court admitted evidence of the defendant's prior uncharged acts of domestic violence against his wife. (*Zavala*, at pp. 761-763.) *Zavala* held that stalking was not a crime of domestic violence as defined by Penal Code former section 13700 and thus the prior uncharged acts could not be used by the jury to infer that the defendant had a disposition to commit the charged offense of stalking. (*Zavala*, at p. 771.) However, *Zavala* did not discuss whether the broader definition of "domestic violence" under section 1109 was applicable.

Ogle, *supra*, 185 Cal.App.4th 1138 declined to follow *Zavala*. (*Ogle*, at p. 1143.) In *Ogle*, the trial court instructed the jury that it could consider the defendant's prior acts of domestic violence, including a stalking conviction, as evidence that he was disposed to commit the charged offenses of making criminal threats, disobeying a domestic relations order, and stalking. (*Id.* at pp. 1140, 1142.) On appeal, the defendant argued that his prior conviction for stalking was inadmissible under section 1109 to prove the charged crimes, because it was not an act of domestic violence. (*Ogle*, at p. 1142.) *Ogle* held that "[s]talking is an act of domestic violence within the meaning of section 1109 as defined by Family Code section 6211, and is therefore admissible to prove propensity in a prosecution for domestic violence." (*Id.* at pp. 1142-1143.)

Defendant argues that the broader definition of "domestic violence" as set forth in the second sentence of section 1109, subdivision (d)(3) applies only to the type of evidence that the prosecution seeks to introduce and not to the charged offense. This issue was considered in *People v. Dallas* (2008) 165 Cal.App.4th 940 (*Dallas*). In that case, the defendant argued that "section 1109 incorporates the definition in Family Code

section 6211 subject to two qualifications—(1) 'if the act occurred no more than five years before the charged offense,' (2) and '[s]ubject to a hearing conducted pursuant to Section 352 . . . .' (Evid. Code, § 1109, subd. (d)(3).) These qualifications seem designed to apply to the type of *evidence* that is made admissible ('evidence of the defendant's commission of other domestic violence'), but not to the type of *prosecution* in which it is made admissible ('a criminal action in which the defendant is accused of an offense involving domestic violence'). (*Id.*, subd. (a)(1).) Defendant concludes that the Legislature must have intended the definition to apply to the former, but not to the latter." (*Dallas*, at p. 953.) *Dallas* rejected this argument: "First of all, it would be somewhat bizarre for 'domestic violence' to mean something different from '*other* domestic violence,' particularly when used in the same sentence. Moreover, precisely *because* the two qualifications are designed to apply to the type of evidence, they do not meaningfully limit the type of prosecution. By definition, the charged offense cannot have occurred 'more than five years before the charged offense'; accordingly, this criterion will always be satisfied. Similarly, the prosecution's discretion to charge a defendant with an offense involving domestic violence is not '[s]ubject to . . . [Evidence Code] Section 352'; accordingly, making the definition subject to Evidence Code section 352 has no effect." (*Dallas*, at p. 954.) *Dallas* found support for its statutory interpretation in the legislative history. (*Id.* at pp. 954-955.) We agree with the reasoning in *Ogle* and *Dallas*.[11]

The next issue is whether the prior acts of domestic violence occurred within the statutory periods set forth in section 1109. Acts of domestic violence under Family Code section 6211 must have occurred within five years of the charged offense. (§ 1109, subd. (d)(3).) Acts of domestic violence under Penal Code former section 13700 must

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[11] Defendant argues that this court should not follow *Dallas*, because *Dallas* failed to acknowledge that the statutory language was unambiguous. We disagree. As *Dallas* noted, whether the first sentence of section 1109 has one or two definitions for "domestic violence" renders the statute ambiguous. (*Dallas, supra*, 165 Cal.App.4th at p. 954.)

have occurred within 10 years of the charged offense "unless the court determines that the admission of this evidence is in the interest of justice." (§ 1109, subd. (e).) Here, the prosecutor argued that the evidence of prior acts, with the exception of some verbal abuse, fell within the narrow definition of domestic violence and thus the acts occurring within 10 years of the charged offense were admissible. The trial court agreed with the understanding that the prosecutor would inform defense counsel if any of the verbal abuse occurred more than five years before the charged offense, thereby allowing defense counsel to raise an objection.[12]

Defendant next claims that even if section 1109 was applicable, the trial court abused its discretion by failing to engage in the weighing of evidence under section 352.

"When a section 352 objection is raised, 'the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value.' [Citations.]" (*People v. Leonard* (1983) 34 Cal.3d 183, 187.) However, "'a court need not expressly weigh prejudice against probative value or even expressly state that it has done so . . . ,' if the record shows the court was aware of its duty and undertook such Evidence Code section 352 balancing. [Citation.]" (*People v.Trujeque* (2015) 61 Cal.4th 227, 278.) The California Supreme Court has found that when the arguments of counsel or comments by the trial court refer to the issues of prejudice and probative value, it could be inferred that the court was aware of section 352 and thus of its duty to weigh probative value against

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[12] Defendant notes that the incident which involved hair-pulling had occurred in 2000, which was more than 10 years before the charged offenses beginning in July 2013. However, since the prosecutor did not identify the hair-pulling incident in her in limine motion, let alone when it occurred, the trial court committed no error in its evidentiary ruling. When the evidence was introduced at trial, there was no objection by defense counsel. Defendant has failed to establish his counsel's performance was deficient. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Defense counsel could have reasonably determined that the objection would have been futile, since the trial court would have admitted the evidence "in the interest of justice." (§ 1109, subd. (e).)

prejudice. (See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 179, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

Here, the prosecutor's motion to introduce evidence pursuant to section 1109 referred to section 352 and the relevant factors to be considered by the trial court. At the beginning of the hearing on the prosecutor's motion, the trial court stated: "So it's clear, every decision that the court makes during in limine proceedings, the court is doing two sets of analysis. One is under Evidence Code 350, to determine if there is any relevant evidence, and secondly, the court is engaging in a balancing process under Evidence Code 352 to determine if the probative value of the evidence of the prior act is substantially outweighed by the possibility that its admission will create a substantial danger of undue prejudice." Thus, we conclude that the trial court was not only aware of its duty under section 352, but also properly exercised its discretion. Evidence of a two-handed choking of Morigeau in 2011, pushing and shoving Morigeau, choking Morigeau several times, and striking Morigeau's face in 2007 tended to prove that defendant had the disposition to repeatedly harass Morigeau and make a credible threat with the intent to place her in reasonable fear for her safety. Though this evidence was prejudicial, it was not unduly prejudicial. Thus, the trial court did not abuse its discretion when it admitted this evidence.

C. Admissibility of Evidence of Fear

Defendant also contends that the trial court abused its discretion when it admitted irrelevant evidence that Timothy Morigeau and Jonathan feared defendant.

Prior to trial, defense counsel brought a motion to exclude any evidence regarding Jonathan's fear of defendant as speculation, hearsay, irrelevant, and a violation of his right to confrontation under the Sixth Amendment. At the hearing on the motion, the prosecutor stated that she might ask Morigeau if she feared for Jonathan's safety as well as her own. Defense counsel pointed out that Morigeau's application for a restraining

order stated that Jonathan had a heart condition and that caused her to fear for his safety. The trial court stated that it would conduct a section 402 hearing on the issue prior to allowing the admission of this evidence. The prosecutor stated that she would not ask Morigeau about Jonathan's heart condition, but she sought to question Morigeau about Jonathan not wanting to sleep in his bedroom. The trial court ruled that if there was not going to be evidence regarding the heart condition, it would not need to hold a hearing.

At trial, Morigeau testified that she knew that Jonathan was scared of defendant. Jonathan had told her that he worried that if she did not do what defendant asked, defendant might hurt her. The trial court immediately gave a limiting instruction that Jonathan's statement was not admitted for the truth of the matter asserted. The jury was further instructed that one of the elements of the charged offense was whether Morigeau feared for herself or the safety of other family members and thus Jonathan's statement could be considered to establish Morigeau's state of mind. Morigeau also testified that when defendant came to get Jonathan's birth certificate, Jonathan was upset and tried to convince her to give defendant the birth certificate to avoid escalating the situation. Jonathan would not sleep in his room for about three nights and wanted to stay in a hotel because he did not feel safe.

Timothy Morigeau testified that he was a protected person on the restraining order, because he was afraid for his own safety. The trial court overruled defense counsel's objection on relevance grounds. He then testified that he was afraid because he knew that defendant had a violent history and that defendant had made statements to his sister that led him to believe that he "should be fearful for [his] life." At defense counsel's request, the trial court immediately held a side bar. On cross-examination, Timothy Morigeau testified that defendant had never threatened or harmed him. On redirect, the prosecutor asked him again why he was afraid of defendant. He stated, "I am scared because -- I'm really afraid to say anything without revealing other evidence . . . ." Defense counsel objected and requested a section 402 hearing.

At the hearing outside the jury's presence, the trial court asked Timothy Morigeau about how he was going to answer the question. Timothy Morigeau stated that he knew that his sister had been choked, physically harmed, harassed and verbally abused by defendant. She had also told him that defendant's comments about him indicated that defendant did not respect him. He knew that defendant: posted negative comments about him on Facebook; had a criminal history; had harmed other people; kept weapons in the house that they had shared; and had a history of using crystal meth. Following argument, the trial court ruled that the prosecutor could ask only if he feared defendant.

"[A]ll relevant evidence is admissible." (§ 351.) "'Relevant evidence'" is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) This court reviews the trial court's rulings on the admissibility of evidence under the abuse of discretion standard. (*People v. Scott* (2011) 52 Cal.4th 452, 491.)

Defendant argues that assuming Jonathan's statement was "a reaction to the April 2013 incident that he observed . . . , that incident was not part of any 'credible threat' occurring between July 17, 2013 and March 2014, that had to be proven to establish stalking," and thus this evidence was not relevant. He argues that Timothy Morigeau's testimony was also not based on any of the threats underlying the stalking charge. Thus, he claims the evidence was not relevant.

We find no abuse of discretion in the admission of this evidence. Morigeau testified that she kept hoping that defendant would change his abusive behavior. Evidence of Jonathan's statement was admitted to show her state of mind. This evidence explained, in part, why she was motivated to seek a restraining order after the April 2013 incident, that is, that her son was being negatively affected by defendant's behavior. Moreover, this evidence further bolstered her credibility that she reasonably feared for her own safety or the safety of her immediate family. Similarly, Timothy Morigeau's testimony was relevant to whether Morigeau reasonably feared defendant. Though there

was no evidence that Timothy Morigeau communicated his fear to his sister, they lived together after she left defendant and thus the jury could reasonably infer that he communicated his fear to her.[13]

D. Cumulative Error

Defendant contends that the errors as to the stalking charge, when considered cumulatively, require reversal. Since we have rejected these claims of error, we reject this contention. (*People v. Myles* (2012) 53 Cal.4th 1181, 1225.)

III. Disposition

The judgment is reversed. On remand, the trial court is directed to reduce the conviction in count one to the offense of stalking (Pen. Code, § 646.9, subd. (a)), strike the convictions in counts two, three, and four (Pen. Code, § 273.6), and resentence defendant.

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[13] Defense counsel objected on relevance grounds to this testimony. She did not argue that it was more prejudicial than probative under section 352. Thus, the issue of whether the trial court evaluated the evidence under this statute has been forfeited. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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